C.A. № A-811-17

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

(Appellant)

- and -

JOHN WILSON AND MARY FERNANDES AND SUZAN SIMPSON AND MARLYS JONES

(Respondents)

APPELLANT'S FACTUM

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PART I:

INTRODUCTION

1. This case deals with when the parent's rights to make decisions regarding the health, and moral upbringing of their children collide with the state's duty and responsibility to protect all of its citizens from the outbreak of a potentially deadly disease. It is a constitutional challenge against the *Protecting Ontarians Against Bigpox Act,* S. O. 2015 c. 13 (*PAOBA*). This legislation must not have been ruled unconstitutional, as it places a reasonable limit on the parents' right guaranteed in the *Canadian Charter of Rights and Freedoms.* The appellant, despite being dismissed at trial, is appealing to the *Court of Appeal for Ontario* for the Justice Mezody's decision to be overturned and the *PAOBA* reinstated.

PART II:

SUMMARY OF THE FACTS

2. In fall 2013, a new disease, variolous humungous (commonly called "bigpox"), was first identified in the United Kingdom.

3. If left untreated (or if the patient is resistant to treatment), bigpox will eventually attack the lungs; in its most extreme cases, bigpox can lead to paralysis of the lungs, leading to death. During its initial outbreak in the United Kingdom, of 3,291 persons

diagnosed with bigpox, 31 died, and a further 479 people have ongoing respiratory problems due to lung damage suffered as a result of bigpox.

4. In March 2014, a bigpox outbreak occurred in Petrolia, Ontario. By the time the outbreak was declared contained three weeks later, 67 people had been diagnosed with bigpox. Sadly, four people died, including a seven-year old boy, a three-year old girl, her 8 year old grandmother, and a 34-year old nurse.

5. A bigpox vaccine was developed in November 2014. By February 2015, the vaccine was being used in areas that had been affected by bigpox outbreaks; by July 2015, the bigpox vaccine was in mass production and could be made available to all persons in Canada.

6. There have been no confirmed cases of bigpox in Ontario since August 12, 2015. World-wide, the incidence of bigpox has plummeted since the vaccine was introduced in 2015.

7. The *Protecting Ontarians Against Bigpox Act*, S.O. 2015 c. 13 (*POABA*), was enacted by the Ontario legislature in 2015. The *POABA* requires that any child who attends a school or a day-care centre in Ontario must have been vaccinated against bigpox. While the *POABA* provides an exemption for children who are unable to take the bigpox vaccine because of a medical condition, there is no exemption for children (or their parents) who object to taking the vaccine for any other reason.

8. The original applicants chose not to vaccinate their children against bigpox for different reasons. Mary Fernandes and John Wilson decided not to have their four-year-old daughter, Rashida, vaccinated because they are concerned that the aluminum adjunct in the vaccine may have a detrimental impact on Rashida's brain development. Suzan Simpson and Marlys Jones are practicing vegans who are raising their son, Harrison, as a vegan. Vegans do not consume any sort of animal product. They decided not have their two-year-old son, Harrison, receive the bigpox vaccine because it contains a compound isolated from sheep blood. Because Rashida and Harrison have not received the bigpox vaccine, and because they do not fall within the medical exemption found within the *POABA*, each of them has been barred from registering for and attending day-care (Harrison) and school (Rashida).

9. These families brought an application against the Attorney General of Ontario, seeking declarations that:

(i) the *POABA* infringes section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") because it violates parents' (and their children's) rights to freedom of religion and freedom of conscience;

(ii) the *POABA* infringes section 15(1) of the *Charter* because it discriminates against parents (and their children) based on their religious or conscientious beliefs;

(iii) the *POABA* infringes section 7 of the *Charter* because it deprives parents of liberty and security of the person in a manner not in accordance with the principles of fundamental justice; and

(iv) the violations of ss. 2(a), 15(1) and 7 of the *Charter* cannot be demonstrably justified under s. 1 of the *Charter* and the offending sections of the *POABA* are therefore of no force and effect.

TRIAL DECISION

10. The Superior Court of Justice, through trial judge J. Mezody, acknowledged the constitutional challenge brought forth by applicants John Wilson and Mary Fernandes and Suzan Simpson and Marlys Jones. Justice Mezody upheld the applicants' claim that the *POABA* infringed upon their rights of ss. 2(a) and 7 of the *Charter,* albeit not s. 15(1). Justice Mezody ruled that the infringements of the *Charter* could not be justified under s. 1.

11. Justice Mezody, in the assessment of 2(a) had no hesitation in finding that the *POABA* infringed upon the right to freedom of conscience, citing *R. v. Big M Drug Mart Ltd.,* [1985] S.C.R. 295 as a precedent in which freedom in a broad sense was defined as one that embraces the absence of coercion and constraint, with coercion defined as including indirect forms of control which determine or limit alternative courses of conduct available to others. Mezody ruled that the *POABA* did indeed deny parents who refuse to vaccinate their children access to schools or day-care in the form of coercion contrary to their conscience, and also drew a distinction between practices or beliefs based on religions and other moral or ethical systems (i.e. veganism) thus

running contrary to the principle that *Charter* rights are to be given a liberal interpretation.

12. In order to amount to a Charter s.15(1) violation, a claim must pass a two-part test set by the Supreme Court of Canada:

1) Does the law create a distinction based on an enumerated or analogous ground?
2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"

Official Problem, Fall 2017 OJEN Charter Challenge, at para 38.

Dealing with the first part of the test, the applicants submit that conscience is an equivalent ground for the purposes of s. 15(1) of the Charter. However, Judge Mezody does not find it necessary to determine this issue. A distinction based on the analogous ground does not amount to s. 15(1) violation. The second part requires the applicants to show that the law has a discriminatory impact. In this case, however, the disadvantage suffered by the applicants is the denial of access to important institutions for their children. These institutions play a critical role in children's lives, but this denial is not based on the characteristics of the applicants, only on the fact that unvaccinated children pose a risk to people who are unable to be vaccinated or have not developed immunity to bigpox despite being vaccinated. For these reasons, Justice Mezody finds that the POABA does not offend s.15(1) of the Charter.

13. The s.7 inquiry involves two steps. The first, whether or not the law engages the applicants' life, liberty, or security of the person interest. The second, whether or not

this infringement of the person is in accordance with the principles of justice. For parents, liberty means that they are allowed to make important decisions regarding their children. This liberty also extends to matters such as decisions about medical care and education. This means that POABA engages s.7 by imposing upon the applicants' rights to liberty and security of the said person. Secondly, Judge Mezody finds that the POABA violates two settled principles of fundamental justice: overbreadth and gross disproportionality. Justice Mezody stated that the law is rationally connected in some of its applications, but goes too far, affecting s.7 rights in other situations when there is no rational connection to the law's purpose.The question under s. 7 is whether anyone's life liberty or security of the person has been denied by a law that is inherently bad a grossly disproportionate, overbroad, or arbitrary affect on one person is sufficient to establish a breach of s. 7.

14. Justice Mezody, while finding that the purpose of *POABA* is pressing and substantial and its infringement rationally connected to that objective, ruled that the *POABA* cannot be justified under s. 1 of the *Charter* because it did not meet the criteria of minimal impairment as the effects of the *POABA* are outweighed by its salutary effects. Mezody stated that a permanent ban on children attending schools or day-cares because they have not received the bigpox vaccine, in the absence of any indication that bigpox remains a threat within their community, is unjustified.

PART III:

GROUNDS OF APPEAL

ISSUE ONE: DOES THE *POABA* INFRINGE SECTION 2(A) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (THE "*CHARTER*") BECAUSE IT VIOLATES PARENTS' (AND THEIR CHILDREN'S) RIGHTS TO FREEDOM OF RELIGION AND FREEDOM OF CONSCIENCE?

15. S.2(a) of the *Charter* provides as follows:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion
>
> ***The Canadian Charter of Rights and Freedoms***, Schedule B, Constitution Act, 1982, s 2(a)

16. The concepts of freedom of conscience and religion underlie our fundamental political and philosophic traditions. They demand that every individual free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

> ***R. v. Big M Drug Mart Ltd.*,** [1985] 1 S.C.R. 295, para 123.

17. The right of parents to rear their children according to their conscience is a fundamental aspect of the freedom of conscience and religion, guaranteed by s. 2(*a*) of the *Charter*. It is the respondents' contention that the *POABA* violates freedom of conscience and religion

by denying parents who refuse to vaccinate their children access to schools or day-cares, and that as a result, such amounts to a practical compulsion to vaccinate even though it is contrary to their conscience *(i.e.,*their belief system). One should be free from the interference of the state and society as it does not pose harmful nor does it infringe upon the rights of any other members of society.

18. The idea of freedom of conscience and religion must conform to the values of Canadian society, and such does not necessarily entail freedom from observing the law. In this case, the province desire to protect vulnerable individuals, such as young children, older persons and persons fighting other diseases or medical conditions such as *variolous humungous* (otherwise known as bigpox). The *POABA* allows the province to deny parental rights when a judge has determined that a child is in need of vaccination that his parents will not consent to. The process contemplated by the *POABA* is carefully crafted, adaptable to a myriad of different situations, and far from arbitrary. The *POABA* outlines a provision for Medical Exemption which states:

2. A child can be exempt from this vaccination:

> a) if a physician licensed to practice medicine in Ontario certifies that it is a danger to the child's health; or
> b) in accordance with any regulations or orders passed by the Minister of Health

Official Problem, Fall 2017 OJEN Charter Challenge, at Schedule "A"

19. While reviewing the trial case *B. (R.) v. Children's Aid Society of Metropolitan, Toronto*

Per Lamer C.J. and Cory, Iacobucci and Major JJ.: A parent's freedom of religion, guaranteed under s. 2 (a) of the Charter, does not include the imposition of conscience and religion practices which threaten the safety, health or life of the child. Although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, as it is subject to such limitations as are necessary to protect the fundamental rights and freedoms of others. Since children, in this case, have never expressed any agreement with vaccination, there is an impingement on their freedom of conscience, which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a conscience and religion belief. "Freedom of conscience and religion" should not encompass activity that so categorically negates the "freedom of conscience" of another.

> ***B. (R.) v. Children's Aid Society of Metropolitan Toronto,*** [1995] 1 S.C.R .315, para 83.

20. The bigpox vaccination has, at the population level, been dramatically successful in reducing the incidence of bigpox meningitis and other serious infections.The bigpox vaccine is also a safe and effective means of preventing the transmission of the smallpox.

> ***Official Problem***, Fall 2017 OJEN Charter Challenge, at Schedule "A"

21. It is in the child's interests to be given permission to arrange for him to receive the vaccine if there are no medical reasons as to why the child should not have the vaccinations according to the immunization schedule and that withholding such vaccines would mean deliberately maintaining his vulnerability to very serious infections. In other

words, it is in the child's best interests for the local authority to arrange for him to receive this vaccination. A parent is, ordinarily, accorded a significant degree of autonomy by the province on whether to vaccinate a child in the exercise of their parental responsibility. However, in circumstances where there is a dispute between those holding parental responsibility (namely, the parents and the local authority) the court is required to determine that dispute by reference to the child's best interests.

22. Based on these arguments presented above, the *POABA* does not violate s. 2(a) of the *Charter,* or even if the *POABA* is found to infringe upon a *Charter* right, the right is reasonably limited under s. 1 of the *Charter*.

ISSUE TWO: DOES THE *POABA* INFRINGE SECTION 15(1) OF THE *CHARTER* BECAUSE IT DISCRIMINATES AGAINST PARENTS (AND THEIR CHILDREN) BASED ON THEIR RELIGIOUS OR CONSCIENTIOUS BELIEFS?

23. S.3 of the POABA reads as follows:

> 3. Any child who has not been vaccinated under s. 1(1) of this *Act*, or who is not exempt under s. 2(a) of this Act, shall not be allowed to register for, or attend:
> c) any school (including a private school) established under the *Education Act*, R.S.O. 1990, c. E.2
> d) any child care centre established under the *Child Care and Early Years Act*, 2014, S.O. 2014, c. 11, Sched. 1

Official Problem, Fall 2017 OJEN Charter Challenge, at Schedule "A"

24. S.15 of the Charter protects against discrimination. It states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity
that has as i ts o bject the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, s 15.

25. S.15(1) is aimed at preventing discriminatory distinctions that impact adversely members of groups identified by the grounds enumerated in s.15 and on analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situations.

26. The Court handed down its first s.15 decision in the case of Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 and The two-stage test for assessing a claim under s. 15(1) of the Charter was established by the Supreme Court in R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17. The Supreme Court subsequently affirmed this test in Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 30. The two-stage test can be summarized as follows:

1) Does the law create a distinction based on an enumerated or analogous ground?
2) Does the distinction create a disadvantage by perpetuating prejudice or

stereotyping?

27. Dealing with stage one, the role of comparison at the first stage is to establish a "distinction." Inherent in the word "distinction" is the idea that the claimant is treated differently than others. The comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1). It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

28. The respondents submit that conscience is an analogous ground for the purposes of s.15(1) of the *Charter.* However, respondents under s.15(1) must show not only that he or she is not receiving equal treatment before and under the law but also that the law has a differential impact on him or her in the protection or benefit accorded by law.In this case, even assuming that "conscience" is a distinction based on an enumerated or analogous ground under s. 15(1), this distinction based on an enumerated or analogous ground does not, by itself, violate s. 15(1), it must also show that the legislative impact of the law is discriminatory.

29. Moving on to stage two, the second part of *Kapp-Withler* test requires the applicants to show that the law has a discriminatory impact. Should the court consider it necessary to proceed to a consideration of section 15(1), the *POABA* does not create a disadvantage by perpetuating prejudice or stereotyping. In writing for the majority on the subject of s.15(1) in *Quebec v, A*, Justice Abella clarifies that, although the indicia of "prejudice and stereotyping are not discrete elements of the test," these factors can be used to determine whether a challenged law violates the norm of substantive equality.

> ***R. v. Kapp*, 2008 SCC 41**, [2008] 2 S.C.R. 483, at paras 17, 23.
> ***Withler v. Canada (Attorney General)**, 2011 SCC 12, [2011] 1 S.C.R. 396, at para 30.*
> ***Quebec (Attorney General) v. A*,** 2013 SCC 5, [2013] 1 S.C.R. 61, at para 323.

30. The analysis at the second stage is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. At this step, a comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.

> Andrea Wright, ***"Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate"***, in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., Making Equality Rights Real: Securing Substantive Equality under the Charter (2006), 409, at p. 432;
> Sophia Reibetanz Moreau, ***"Equality Rights and the Relevance of Comparator Groups"*** (2006), 5 J.L. & Equality 81; Pothier.

31. The requirements in the *POABA* are not rooted in prejudice and stereotypical assumptions, but recognize the unique features of public health. The competency requirement in the *POABA* provisions does not perpetuate pre-existing disadvantages, but rather, helps to alleviate the disadvantages faced by individuals who are vulnerable to bigpox.In this case, the disadvantage suffered by the respondents is the denial of access to school and day-care. While these institutions play a critical role in children's lives, the denial of this access is not based on the circumstances or characteristics of the respondents'. The denial of access is based on the Proposition, founded upon accepted science, that unvaccinated children pose a risk to people (particularly other children) who are unable to be vaccinated or who, despite being vaccinated, have not developed immunity to bigpox. Because schools and day-cares are placed where children congregate and spend a great deal of time together in close proximity, denying access to these two locations is rationally connected to the province's purpose.

32. The requirements in the statutory scheme do not arise from demeaning stereotypes, but are "neutral and rationally defensible policy choice[s]" that take into account the actual needs, circumstances and capacities of the claimants and others in similar situations (Hutterian Brethern). The Supreme Court of Canada affirmed in *Quebec v A* that, to the extent, a provision takes into account the claimant's actual situation in a manner that respects the claimant's needs, capacities and circumstances, it is less likely to be discriminatory.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2

S.C.R 567, at para 108.
Quebec (Attorney General) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61, at para 418.

33. For these reasons, denying access to schools and day-cares to children whose parents choose not to vaccinate them for conscientious reasons is not discriminatory, therefore it can be concluded that the *POABA* does not offend s. 15(1) of the *Charter.*

ISSUE THREE: DOES THE *POABA* INFRINGE SECTION 7 OF THE *CHARTER* BECAUSE IT DEPRIVES PARENTS OF LIBERTY AND SECURITY OF THE PERSON IN A MANNER NOT IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE?

34. Section 7 of the *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, s 7

35. The courts have established a two-part test to assess potential violations of section 7: first, there must be an infringement to an individual's rights to life, liberty or security of the person; and second, the infringement must be contrary to a principle of fundamental justice (Bedford). The Supreme Court has affirmed that the scope of rights defined by section 7 of the Charter must be given a broad, liberal interpretation, which the principles of fundamental justice must qualify rather than restrict (Motor Vehicle).

Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 S.C.R 1101, at para 58.
Reference re Motor Vehicle Act (British Columbia) , [1985] 2 S.C.R 486, at para 60.

36. Dealing with stage one, the question that needs to be addressed is whether s.3 of the *POABA* limits or negatively impacts the life, the liberty and the security of the repondents which would serve to engage section 7 of the Charter.

37. S.3 of the *POABA* respectively prohibits children attending schools or day-cares if they have not received the bigpox vaccine.

Official Problem, Fall 2017 OJEN Charter Challenge, at Schedule "A"

38. The right to liberty under s.7 of the *Charter* protects "the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference", such as the "right to nurture a child, to care for its development, and to make decisions for it in fundamental matters" (B(R)). Liberty interests are grounded in the individual's right to "dignity and independence" in "fundamentally or inherently personal" matters (Clay).

B. (R.) v. Children's Aid Society of Metropolitan Toronto, supra, at para 83.
R v. Clay, 2003 SCC 75**,** at para 31.

39. For these reasons, the Appellant conceded that there is an infringement to an individual's rights to life, liberty or security of the person.

40. Moving on to stage two, the court must identify and define the relevant principle or principles of fundamental justice and determine whether the deprivation respects the relevant principle or principles of fundamental justice. Fundamental justice is violated by limitations that are arbitrary, overly broad or disproportionate to the province's objectives. Dealing with the fundamental justice test, in *Malmo-Levine*, the Supreme Court provided a two-step analysis test for disproportionality: first, does the law pursue a legitimate State interest; and second, is the law grossly disproportionate to the State interest?

R v. Malmo-Levine, 2003 SCC 74, [2003] 3 S.C.R 571, at para 143.

41. The respondents have failed to discharge his burden of proving that a deprivation and breach of fundamental justice has occurred. The liberty protected by s.7 of the *Charter* does not mean unconstrained freedom. Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The province undoubtedly has the right to impose many types of restraints on individual behavior, and not all limitations will attract *Charter* scrutiny.The *POABA* is intrinsically concerned about province's duty to protect its citizens from the ravages of a deadly disease. The government's policy is that citizens' health and security should not be undermined by allowing citizens' health to be at risk. The view that human life is inviolable is fundamental to our society's conception of the sanctity of life. Even if there is a remote possibility that the *POABA* engages s.7, by impinging upon the respondents' rights to liberty and security of the person, any violation of the respondent's life, liberty or security is in accordance with the principles of fundamental justice.

***R v. Malmo-Levine**,* ibid, at para 130.
***Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)**,*2004 SCC 4, [2004] 1 S.C.R 76, at para 3.

42. The *POABA* pursues the legitimate province interest of providing public health system using community immunity. The denial of access to important institutions for their children: school and day-care are based on the proposition, founded upon accepted science, that unvaccinated children pose a risk to people (particularly other children) for those who are unable to be vaccinated or who, despite being vaccinated, have not developed immunity to bigpox. Based on these stage two arguments presented above, the *POABA* does not deprive the respondents of life, liberty or security; in the alternative, any deprivation is in accordance with the principles of fundamental justice.

***R v. Malmo-Levine**,* ibid, at para 130.

43. The *POABA* is not grossly disproportionate to the province's objective of preventing the significant danger that bigpox poses to the health of Ontarians.While parents bear responsibilities toward their children, they must enjoy correlative rights to exercise them, given the fundamental importance of choice and personal autonomy in our society. Although this liberty interest is not a parental right tantamount to a right of property in children, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such

decisions itself. While the state may intervene when it considers it necessary to safeguard the child's autonomy or health, such intervention must be justified. The state thus can properly intervene in situations where parental conduct falls below the socially acceptable threshold, but in doing so, it is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children.

> ***B. (R.) v. Children's Aid Society of Metropolitan Toronto**,* supra, at paras 83,84.

44. An exercise of parental liberty which seriously endangers the survival of the child should be viewed as falling outside s.7 of the *Charter*. While the right to liberty embedded in s.7 may encompass the right of parents to have input into the education of their child, and in fact may very well permit parents to choose among equally effective types of medical treatment for their children, it does not include a parents' right to deny a child vaccination that has been adjudged necessary by a medical professional and for which there is no legitimate alternative. The child's right to life must not be so completely subsumed to the parental liberty to make decisions regarding that child. Although an individual may refuse any medical procedures upon her own person, it is quite another matter to speak for another separate individual, especially when that individual cannot speak for herself. Parental duties are to be discharged according to the "best interests" of the child. The exercise of parental beliefs that grossly invades those best interests is not activity protected by the right to liberty in s.7. There is simply no room within s.7 for parents to override the child's right to life and security of the person.

> ***B. (R.) v. Children's Aid Society of Metropolitan Toronto**,* ibid.

45. Applying these principles to this case, the court can conclude that the *POABA* does not violate s. 7 of the *Charter.*

ISSUE FOUR: IF THE *POABA* INFRINGES SECTION 2(A), SECTION 15(1) OR SECTION 7, IS THE INFRINGEMENT JUSTIFIED UNDER SECTION 1 OF THE CHARTER?

46. s. 1 of the Charter states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

> ***The Canadian Charter of Rights and Freedoms****,* Schedule B, Constitution Act,1982, s. 1.

47. The test for s. 1 analysis was provided in R v. Oakes, which states:

> To establish that a limit is reasonable and demonstrably justified ina free and democratic society, two central criteria must be satisfied. First, the objective. . .must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". . .It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable a nd demonstrably justified. . .First, the measuresa dopted must be. . .rationally connected to the objective. Second, the means. . .should impair "as little as possible" the right or freedom in question. . .Third, there must be a proportionality between the e ffects of the measures which are responsible for imiting the C harter right or freedom, and the objective which has been identified as of "sufficient importance".

R. v. Oakes, [1986] 1 S.C.R. 103, at paras 69,70

48. The appellant respectfully submits that any potential infringement of the respondents' s.2(a), s. 7 or s.15(1) Charter rights are prescribed by law and demonstrably justified in a free and democratic society. The *POABA* has a pressing and substantial objective.The means in the provisions of the *POABA* are proportional, as the provisions are rationally connected to the province's objective, minimally impairing on the respondents' rights and the salutary effects of the provision outweigh its deleterious effects. As a result, the *POABA* is justified under a section 1 analysis.

***The Canadian Charter of Rights and Freedoms**,* Schedule B, Constitution Act, 1982, ss 1, 2, 7, 15.
R v Oakes, ibid, at paras 69,70.
Hutterian Brethren, supra, at para 71.

1. The *POABA* is the limit prescribed by law

49. S.1 requires that before a proportionality analysis is undertaken, the court must satisfy itself that the measure is "prescribed by law." If a limit on a *Charter* right is not "prescribed by law" it cannot be justified under s.1. Rather, it is a government act, attracting a remedy under s.24 of the Charter. This first question to be addressed under s.1 analysis is whether the impugned provisions are 'limits prescribed by law' within the meaning of s. 1.75 In R. v. Therens, Le Dain J. (dissenting on other grounds) stated that '[t]he limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or

regulation or from its operating requirements'. The *POABA* is,undoubtedly, "prescribed by law" under s.1 of the *Charter* because it is duly enacted legislative provisions. The *POABA* also does not imperil the rule of law. Thus, it is limits prescribed by law for the purposes of the s.1 analysis.

> ***Irwin Toy Ltd. v. Canada (Attorney General)*** 1989 SCC, [1989] 1 S.C.R. 927, at p. 981.
> ***R. v. Therens**,* [1985] 1 S.C.R 613, at para 56.

2. The *POABA* reflects a pressing and substantial legislative objective

50. The s. 1 analysis asks whether the objective of the impugned provisions is 'sufficiently important to justify overriding a Charter freedom.' The SCC has noted the 'great importance,' to the s. 1 analysis, of properly characterizing the objective of the impugned provisions. Deschamps J. has written that 'all steps of the Oakes test are premised on a proper identification of the objective of the impugned measure.' Of particular concern is the need to ensure that the objective is not articulated in an overbroad manner. As stated by McLachlin J., in RJR-MacDonald Inc v. Canada (Attorney General), '[i]f the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.' The pith and substance of the POABA relate to a valid provincial head of power and the POABA's objective which is preventing the transmission of the smallpox is not articulated in an overbroad manner.

> **R v Oakes***,* supra, at para 69.
> ***Delisle v Canada (Deputy Attorney General),*** supra, at para 112.

Toronto Star Newspapers Ltd v Canada, 2010 SCC 21, at para 20.
RJR-MacDonald Inc v Canada (Attorney General)*,* [1995] 3 S.C.R 199, at para 144.
Canada (Attorney General) v. JTI-Macdonald Corp. 2007 SCC 30, at para 38.

51. The SCC has considered a wide range of objectives to be pressing and substantial, demonstrating that the threshold for such a determination is one that is not overly onerous for governments to meet. As The Constitutional Law Group notes, '[t]he courts seem prepared to regard almost any purpose … as "pressing and substantial". A wide range of benefits flow to the public since protecting the health of people by preventing the spread of bigpox,is connected to the realization of collective goals of fundamental importance. This objective is neither 'trivial' nor 'discordant with the principles integral to a free and democratic society'. The arguments outlined above strongly suggest that the objective of the impugned provisions would be seen as being of pressing and substantial importance.

The Constitutional Law Group, ***Canadian Constitutional Law*** (4th edn, Emond Montgomery Publications Limited 2010) at p.777.
Canada (Attorney General) v. JTI-Macdonald Corp, ibid, at para 37.
R v Oakes*,* supra, at para 69.

52. By experiencing the impact of the 2014 outbreak in Petrolia, Ontario, the Government of Ontario saw first-hand the devastating toll that bigpox can have on a community once the infection takes place. The Government of Ontario recognizes the significant pressing danger that variolous humungous (bigpox) poses to the health of Ontarians. Bigpox poses the most significant danger to vulnerable Ontarians, such as young children, older persons and persons fighting other diseases or medical conditions. And bigpox vaccine is

a safe and effective means of preventing the transmission of the smallpox. In this case it is clear that the issue addressed by the legislation,preventing the transmission of the smallpox, is pressing and substantial.

Official Problem, Fall 2017 OJEN Charter Challenge, at para 11.

3. The *POABA* is rationally connected to the government's objectives

53. There must be a rational "connection between the infringement and the benefit sought on the basis of reason or logic" (RJR-MacDonald). This requires only a reasonable prospect that the limit will further the objective, to some extent, not that it will do so (Hutterian Brethren).

RJR-MacDonald Inc v Canada (Attorney General), supra, at para 153.
Hutterian Brethren, supra, at para 48.

54. The rational connection test is met where the government can show that it is reasonable to suppose that the limit will further their objective. The *POABA* is carefully tailored to ensure that a base level of the population is resistant to a bigpox, in order to contain its spread. Community immunity is a form of indirect protection from infectious disease that occurs when a significant portion of a population is immune to an infection. The larger the proportion of individuals in a community who are immune, the less likely those who are not immune will come into contact with an infectious individual and thus contract the disease. A large majority of parents is agreed with the beneficial effect of vaccination on

the health of their children and voluntarily enroll their children in such programs. Based on the foregoing analysis, the appellant submits that restrictive measures outlined in s. 3 of the *POABA* are rationally connected to its purpose. The means taken by the government help to achieve this goal. One need look no further than the impact of the 2014 outbreak in Petrolia, Ontario, to see the devastating toll that bigpox can have on a community once infection takes place.

4. The *POABA* minimally impairs the respondents' rights

55. In R. v. Oakes, the SCC required courts to demonstrate, in order to satisfy this branch of the proportionality analysis, that 'the means … should impair "as little as possible" the right or freedom in question".

> ***Oakes***, supra, at para 70.
> ***R v Big M Drug Mart Ltd***, supra, at para 139.

56. In R v. St-Onge Lamoureux, Deschamps J., writing for the majority, stated that:

In the minimal impairment inquiry, the court must not second‑guess Parliament and try to identify the least intrusive solution. In Downey, this Court stated that ' … the issue is "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively"'.

> ***R. v. St-Onge Lamoureux**,* 2012 SCC 57, at para 39.

57. The degree of proof required for determining minimal impairment was outlined by the

SCC in Irwin Toy Ltd. v. Quebec (Attorney General) :

> The party seeking to uphold the limit must demonstrate o n a balance of probabilities that the means chosen impair the freedom or right in question as little as possible. (emphasis added)

Irwin Toy Ltd. v. Canada (Attorney General), supra, at para 79.

58. In assessing whether the impugned provisions minimally impair the respondents' rights, the government is not required to choose the least intrusive means to achieve its objective. When the State is balancing competing social policy considerations, the Court should consider whether the government's action were reasonable, not whether the infringement was "literally minimal." Similarly, in Hutterian Brethren, Chief Justice McLachlin stated, "the courts must accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives." Exclusion from school due to state's duty to protect its citizens from the ravages of a deadly disease. is precisely this type of "complex social issue." Accordingly, the Court should assess minimal impairment based on its reasonableness, not whether the infringement is "literally minimally" impairing on the respondents' rights.

Oakes, supra,at para 70.
Hutterian Brethren, supra,at para 26.

59. The appellant submits that the *POABA* is minimally impairing to all rights on a that may have been infringed, as any attempt to further limit the degree of impairment would result in substantial deviation from province's original purpose.

60. Regarding the respondent's s.7 claim, the only way to reduce the inequality caused by the *POABA* would be to expand it to include all unvaccinated children on such grouds, but doing so would compromise the purpose of the legislation, detracting from its original goal. Once the assessment in terms of substantial criteria has been abandoned, it becomes quite difficult to exclude many of the current secular convictions that are employed to object to vaccination. After all, most of them are not merely objections to vaccination, but, instead, embedded in wider religious, spiritual, or holistic ideas. As such, not only does the distinction between religious and secular objections collapse, but the distinction between genuine and less genuine free-rider objections might dissolve as well. After all, since free riders are forced to present their objections in terms of genuine grievances in order to be taken into consideration, it will be very hard to design law and policies that can straightforwardly make the distinction between those objections that warrant exemptions, and those that do not. In this regard, it is possible to conclude that the *POABA* does not violate two settled principles of fundamental justice of s7: overbreadth and gross disproportionality.Thus the *POABA* is minimally impairing because it is a reasonable course of action to balance competing for social policy considerations.

61. Moreover, the competency requirement is supported by the facts of this case. Given the fact that we can encounter a growing modern anti-vaccination movement, it is reasonable for the state to enact the provisions to maintain community immunity, which occurs when a critical portion of a community is immunized against a contagious disease, the virus can no longer circulate in the population, so that the disease cannot gain foothold in that society. Given their possible devastating effects shown in 2014, the state has a compelling interest in preventing major outbreaks of infectious diseases. In this case,

state's duty to protect its citizens from the ravages of a deadly disease still exists since there is no concrete scientific evidence of possible devastating danger cease to exist. The *POABA* also must not be interpreted to imply compulsory immunization. It permitted exceptions for medical grounds and only prohibits all children who have not receive the bigpox vaccine from attending a school or day-care to protect society against major threats to public health. A patient is not only a victim of the disease, but also a vector in its further spread. Infected persons can infect others and contribute to outbreaks. Vaccination reduces the number of potential hosts—and thus carriers—of the disease in the population. The higher the vaccination rate, the harder it is for a disease to spread. Fighting infectious diseases is generally considered to be a classic government task. Vaccinations can also be regarded as a public responsibility, something good citizens do for the collective good. When vaccination rates are too low among the high-risk population, those who are not immunized are at risk. Vaccination after an outbreak is not efficient for community immunity. As a consequence, the bigpox should not merely be discussed in terms of parent–child responsibilities, but primarily in terms of public health. Based on these arguments presented above, the *POABA* is minimally impairing because it is a reasonable course of action to balance competing social policy considerations.

62. Regarding the respondent's s.2(a) claim, a parent's freedom of religion and freedom of conscience, guaranteed under s. 2(a) of the *Charter*, does not include the imposition of religious and conscience practices which threaten the safety, health or life of the child. States shall take all appropriate measures to ensure that the child is protected against any threatened on the beliefs of the child's parents.

Article 2 of Convention on the Rights of the Child states:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour,sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

. Canada became a signatory to the Convention on 28 May 1990 and ratified in 1991. The convention was influential in the court decision of Baker v Canada (Minister of Citizenship and Immigration).Historically laws in Canada and around the world approached children as chattels,property to be allocated according to their parents' interests. Children were not fully legal persons with rights of their own deserving of protection. However, the latter part of the twentieth century witnessed dramatic progress in recognizing and respecting children's rights in Canada. In Baker v Canada, the majority decision considered the importance of children's rights and best interests, as set out in the Convention and other international law instruments which have been ratified by Canada.

UN Convention on the Rights of the Child, article 2
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R 817, para 80.

63. Although the freedom of religion and freedom of conscience may be broad, the freedom to act upon those beliefs is considerably narrower, as it is subject to such limitations as are necessary to protect the fundamental rights and freedoms of others. Since

respondent's children have never expressed any concern with the effects of aluminum in early brain development and vegan, there is an impingement on their freedom of conscience, which arguably includes the right to have vaccination for their health. "Freedom of religion and freedom of conscience " should not encompass activity that so categorically negates the "freedom of religion and freedom of conscience" of another. While s.1 of the Charter may be the appropriate forum for balancing the interests of the state against the rights violation of the aggrieved individual, such a balance is not required here, since the nexus of the balancing operates between the child's right to health and security of the person and their parents' right to freedom of religion and freedom of conscience. The court needs to consider the issue of vaccinations in the context of children who were the subject of final care orders. It was in the child's best interests to receive the outstanding vaccines. The determination of the dispute by the court was not an example of the overreaching by the state into an area of parental choice, but was rather an example of the court discharging its obligation to ensure that the child's welfare was safeguarded. The appellant thus submits that the *POABA* passes such scrutiny and the state indeed had a "reasonable basis" to conclude that the restrictions were of minimal impairment as outlined supra.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, supra, para 84.

5. Any alleged deleterious effects of the *POABA* are proportional to their salutary effects

64. The Court must consider whether the limit on the right is proportionate in effect to the public benefit conferred by its limitation. This involves determining whether any harms done to the Respondent's s. 2(a), s 15(1), s.7 rights "are out of proportion with the public good achieved by the infringing measure" (Hutterian).

Hutterian Brethren, supra, at paras 73, 78.

65. Further, based on the foregoing analysis of minimal impairment, the deleterious effects of the *POABA* are outweighed by its salutary effects. Moreover, with regards to the respondent's rights under section 2(a), section 15(1), section 7 of the Charter, these had to be balanced against Article 24 of the United Nations Convention on the Rights of the Child which enshrines the right of the child to the enjoyment of the highest attainable standard of health and, within that context, imposes on States parties an obligation to pursue full implementation of that right, *including the taking of appropriate measures to combat disease*.

66. The right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as vaccination, are part of the liberty interest of a parent. However, in recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated when necessity was demonstrated, individual interest of fundamental importance to our society. Furthermore, The Supreme Court has released its decision in the case of *M.J.T. v. D.M.D.* that the benefits of immunization to [the child] significantly outweigh any risk of side effects.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, supra, para 84.
M.J.T. v. D.M.D., 2012 BCSC 863, para 176.
C v A (A Minor) [2011] EWHC 4033 (Fam)
SL (Permission to Vaccinate), Re 2017 EWHC (Fam) EWHC (30 January 2017) [2017] EWHC 125 (Fam)

67. In the present case the application of the *POABA* deprived the respondents' right to decide to have vaccination to their children and in so doing has infringed upon the parental "liberty" protected in s.7 of the *Charter.* This deprivation, however, was made in accordance with the principles of fundamental justice. The common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its *parens patriae* jurisdiction. The protection of a child's right to life and to health is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long as it also meets the requirements of fair procedure. The general procedure under the *POABA* also accords with the principles of fundamental justice.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, supra, paras. 83,84,87.

68. The right of parents to rear their children according to their religious and conscience beliefs, including that of having vaccination for their children, is a fundamental freedom of conscience, guaranteed by s.2(*a*) of the *Charter* . While the purpose of the *POABA* does not require that parents vaccinate their children under threat of a penalty such as a fine or imprisonment. Instead, the *POABA* requires vaccination as a pre-condition to children attending schools or day-cares. This legislative scheme it implements, being barred from

schools and day-cares for not having vaccination will result in social isolation, stigma and educational deprivation for children, and added expense and strain on their parents. This infringement was justified, however, under s.1 of the *Charter*. The state interest in protecting children at risk is a pressing and substantial objective.

69. Based on these arguments presented above, the appellant submits that even if the law is found to infringe upon a Charter right, the right is reasonably limited under s. 1 of the *Charter .*

APPLICATION TO THIS CASE

70.The Appellant requests that the appeal be allowed and seeks a declaration that the *POABA* does not violate s. 2(a), s.7 and s.15 (1) of the Charter and any infringements are justified under s. 1 of the Charter.

PART IV:

ADDITIONAL ISSUES

71. The Appellant raises no additional issues.

PART V:

ORDER REQUESTED

72. It is respectfully requested that the decision of the trial judge be overturned and the legislation be declared valid.

ALL OF WHICH is respectfully submitted by

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Gabby Chan
Mehak Shah
Beatrice Han

Of Counsel for the Appellant

DATED AT WILLIAM LYON MACENZIE COLLEGIATE INSTITUTE

this 20th Day of **November, 2017**

APPENDIX A

AUTHORITIES TO BE CITED

LEGISLATION

The Canadian Charter of Rights and Freedoms, Schedule B, Constitution Act, 1982, ss. 1,2(a), 7, 15

Protecting Ontarians Against Bigpox Act*,* S.O. 2015, c. 13, ss.1 ,2,3

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